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728947—47——1

# In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 825

OSMOND Y. LADD AND PAUL H. TODD, PETITIONERS

*v.*

BARTHOLOMEW A. BRICKLEY, TRUSTEE OF INTERNATIONAL HYDRO ELECTRIC SYSTEM, SECURITIES AND EXCHANGE COMMISSION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT*

## BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

### OPINIONS BELOW

The opinion of the circuit court of appeals (R. 1721–1736) is as yet unreported. The district court filed no opinion. Its decree is contained in pages 348 to 353 of the printed record.

### JURISDICTION

The judgment of the circuit court of appeals was entered on November 14, 1946 (R. 1736).

A stay of mandate was ordered on November 25, 1946, pending application for certiorari (R. 1736). The petition for a writ of certiorari was filed on December 28, 1946. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. 347, which is made applicable by Section 25 of the Public Utility Holding Company Act of 1935, 49 Stat. 835, 15 U. S. C. 79y.

## QUESTIONS PRESENTED

The district court approved a settlement which included payment of the sum of $10,000,000 in cash in compromise of certain disputed claims made the subject of collateral litigation instituted by a court-appointed trustee on behalf of an estate being administered under the Public Utility Holding Company Act of 1935, it appearing that there were substantial problems of proof and doubtful issues of law which seriously affected the certainty and amount of recovery. The district court found that the settlement was for the best interests of the estate and was fair, reasonable and adequate.

The questions presented are—

1. (a) Whether the circuit court of appeals properly held that the findings made by the district court were sufficient, in view of the nature of the question for determination.

(b) Whether, in such a case, the district court was required by the Federal Rules of Civil Pro-

cedure to enter detailed findings of fact and conclusions of law.

2. Whether the court below properly held that the district court did not abuse its discretion in approving the settlement?

## STATEMENT

The International Hydro Electric System ("Hydro") is a public utility holding company registered under Section 5 (a) of the Public Utility Holding Company Act of 1935 (the "Act"), 49 Stat. 812, 15 U. S. C. 79e (a) (R. 194).[1] It owns controlling interests in several operating utility companies and in the New England Power Association which is itself a registered holding company with numerous subsidiaries of its own (R. 195–198). In turn, until January 1939, Hydro was a subsidiary of the International Paper Company ("Paper Company").[2] In 1939, Paper Company disposed of its holdings in Hydro as part of a general divestment of its power securi-

[1] Registration was effected on February 2, 1939.

[2] The present International Paper Company was formed in 1941, and acquired all the assets and assumed all the liabilities of International Paper & Power Company which had been formed in 1928 for the purpose of taking control of the old International Paper Company as part of a plan by the latter to separate its water-power and paper interests. In 1941, the old International Paper Company was consolidated into the new company (R. 487–488).

Except where referred to as a defendant in the lawsuits, "Paper Company" means the old International Paper Company.

ties enabling the Commission to declare it not to be a holding company within the meaning of the Act.[3]

In July of 1942, after extended hearings held for the purpose of determining what action was necessary, under Section 11 (b) (2) of the Act, 49 Stat. 821, 15 U. S. C. 79k (b) (2), to insure that the corporate structure of Hydro, or its continued existence, would not unduly complicate Hydro's holding company system or unfairly distribute voting power among the security holders therein, the Securities and Exchange Commission (the "Commission") ordered the liquidation and dissolution of Hydro and required it to submit a plan for that purpose (R. 238). That order was reviewed on the merits and sustained by the Circuit Court of Appeals for the Sixth Circuit in June of 1943 (R. 194, 243).[4]

Thereafter, in August of 1943, the Commission instituted an action in the United States District Court for the District of Massachusetts, under Sections 11 (d), 18 (f), and 25 of the Act, 49 Stat. 821, 832, 835, 15 U. S. C. §§ 79k (d), 79r (f), and 79y, for the purpose of obtaining compliance with its liquidation and dissolution order (R. 192). Its application to the court stated, *inter alia,* that Hydro had indicated its inability to comply with the Commission's order without the help of the

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[3] *International Paper and Power Co., et al.*, 4 S. E. C. 873.
[4] *Todd* v. *S. E. C.*, 139 F. 2d 700 (C. C. A. 6).

court; that liquidation and dissolution could not properly be effectuated without resolution of claims asserted in two pending shareholders' derivative actions on behalf of Hydro against the Paper Company, seeking rescission of the transactions by which Hydro acquired from the Paper Company and its affiliates some or all of its principal assets, or seeking, in the alternative, large sums as damages; and that the threatened multiplicity of lawsuits would interfere seriously with the orderly liquidation and dissolution contemplated by the Commission's order (R. 195–201). Accordingly, the district court was asked to take exclusive jurisdiction of Hydro and its assets and to enjoin all interference with the Section 11 (d) enforcement proceedings, including the commencement or prosecution of any actions against or on behalf of Hydro, with the exception of the two pending stockholders' actions. In addition, the Commission asked the district court to appoint a special counsel to investigate the alleged causes of action against the Paper Company and to file a report and recommendation with regard thereto (R. 201–203).

The relief sought by the Commission was granted by the district court without opposition, and, in October 1943, Bartholomew A. Brickley was appointed special counsel to investigate Hydro's claims against the Paper Company (R. 260–262). The Commission also commenced its

own investigation for the purpose of aiding Brickley and subsequently was able to furnish him with considerable data and numerous studies made by its staff (R. 263, 459–460).

In November of 1944, more than a year after his appointment, Brickley filed his report as special counsel (R. 263–306). The report sets forth the data uncovered by Brickley from examinations of witnesses, corporate records, files, accounts, and other available materials (R. 267–293). The examinations of witnesses, however, were *ex parte* without opportunity for cross examination or rebuttal by the defendants in the litigation (R. 262, 1319, 1599, 1661). The report acknowledges the many legal problems involved in the successful prosecution of Hydro's claims but nevertheless recommends the institution of court proceedings for the purpose of obtaining rescission, damages, or both (R. 294).

The facts which Hydro would attempt to prove in its lawsuits against the Paper Company and its affiliates are set forth in Brickley's report as special counsel (R. 263–306), and are also referred to in the briefs of the other parties. No useful purpose would be served by further restatement in this brief.

In November of 1944, shortly after the filing of his report as special counsel, Brickley was appointed trustee of the estate of Hydro and directed to institute suit against the Paper Com-

pany (R. 306–307). In January of 1945, the trustee instituted two lawsuits, one in the United States District Court for the District of Massachusetts and another in the Massachusetts Superior Court for Suffolk County, each seeking rescission or damages in the total approximate amount of $96,000,000 (R. 308).

Thereafter, Brickley and the Paper Company began negotiations for the possible compromise and settlement of the litigation (R. 309). On November 13, 1945, before any trial on the merits, an agreement was reached providing terms and conditions for the termination of all litigation arising from the transactions involved, including the two shareholders' actions previously mentioned, subject to the approval of the court (R. 311–317). Under the agreement, the estate of Hydro would receive $10,000,000 in cash,[5] and the undertaking of the Paper Company to purchase $3,000,000 of second mortgage bonds of one of Hydro's subsidiaries.[6]

---

[5] The Paper Company's original offer was approximately $500,000. After many discussions, it offered $3,000,000. The offer was subsequently raised to $5,000,000, to $7,500,000, and finally to $10,000,000 (R. 387).

[6] A modification of this latter obligation, agreeable to the parties in interest, has been consummated with the approval of the Commission under applicable provisions of the Holding Company Act. See *In re Eastern New York Paper Co., et al.*, Holding Company Act of 1935, Release No. 7042. (Dec. 4, 1946.)

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Court approval of the settlement was sought in a petition filed by Brickley on November 23, 1945 (R. 307), and was granted on December 26, 1945 (R. 348–353), following a hearing held on December 17, 18 and 21, 1945 (R. 347). The district court filed no opinion but did find in its decree that "the compromise * * * agreement * * * is for the best interests of the estate of said System [i. e., Hydro], [and] that the consideration payable thereunder to said System is fair, reasonable, and adequate" (R. 348).

Prompt action by the district court was compelled by provisions in the settlement agreement conditioning its effectiveness upon court approval by December 29, 1945, and upon receipt by the Paper Company on or before December 29, 1945, of a ruling (as distinguished from a closing agreement) from the Collector of Internal Revenue that payment by deposit of the $10,000,000 with the clerk of court prior to December 31, 1945, would entitle it to deduct the sum from its gross income for the year 1945 (R. 315–316). These conditions were met and the sum deposited on December 28, 1945 (R. 1711).

On January 25, 1946, petitioners, junior security holders of Hydro, appealed from the decree of the district court approving the compromise settlement (R. 1705–1706), and, on November 14, 1946, the circuit court of appeals entered its judgment affirming that decree (R. 1736).

ARGUMENT

1. The circuit court of appeals properly concluded that the district court had made such findings of fact as were consonant with the nature of the case. The settlement offer had been accepted by the trustee after consideration of the hazards of litigation, including substantial problems of proof and doubtful issues of law affecting the certainty and extent of potential recovery. The district court specifically found that "the compromise * * * agreement * * * is for the best interests of the state * * * [and] that the consideration payable thereunder * * * is fair, reasonable, and adequate" (R. 348).[7] These were findings of the "ultimate facts" in the controversy, *i. e.*, the resolution of all the imponderables in the determination of whether or not the compromise was fair, reasonable and adequate.

Certainly, it was not the function of the court to make findings upon the facts which would have to be determined in the suits against the Paper Company prior to any trial therein or to resolve the legal issues there involved before proper resolution of the essential facts. The question before the court was the approval of a

[7] Findings of fact, of course, need not be formally labeled as such. A statement in a decree, order, or even opinion of the court is sufficient compliance with Rule 52 (a) where applicable: *Woodruff* v. *Heiser*, 150 F. 2d 873 (C. C. A. 10), certiorari denied, 326 U. S. 778; *Wellman* v. *United States*, 25 F. Supp. 868, 869 (D. Mass.).

compromise settlement of untried claims rather than the determination of the validity of Hydro's alleged causes of action. Cataloging the various considerations, intangible and otherwise, which the court may have taken into account in arriving at its ultimate determination to approve the business judgment of the trustee would have hardly constituted "findings" of the type contemplated by Rule 52 (a) of the Federal Rules of Civil Procedure, 28 U. S. C., following § 723, applicable to an "action tried upon the facts". Factors such as these fully justify the ruling of the court below that the "ultimate facts" found by the district court satisfied the requirement of Rule 52 (a), if applicable to a case of this character.[8]

The court below also ruled that Rule 52 (a) did not apply since the instant case was not an "action tried upon the facts". Rather, since approval of the compromise settlement arose in the

[8] Petitioners have cited no case involving judicial approval of a compromise settlement in which more detailed findings were required, and we are aware of none. Compare *Fernow v. Gubser*, 136 F. 2d 971, 972 (C. C. A. 10) ("the court expressly found that the compromise was just, equitable, and to the best interests of both companies and all other parties in interest".); *In re Riggi Bros. Co.*, 42 F. 2d 174, 177 (C. C. A. 2) ("the District Judge * * * found that the settlement was beneficial to all the creditors"); and *In re F. P. Newport Corp.*, 98 F. 2d 453, 457 (C. C. A. 9, 1938) ("* * * the trial court's finding that the agreement, as modified, was equitable, fair and advantageous to the bankrupt estate").

course of the administration of an estate under the Public Utility Holding Company Act of 1935, Brickley's position being similar to that of a court-appointed receiver, the court below held that Rule 66, instead, was applicable (R. 1736). That rule provides that the practice in the administration of estates by receivers and similar court-appointed officers shall be in accordance with the prior practice in the federal courts, or as provided by local rules of court. We know of no settled equity practice in receiverships justifying the conclusion that detailed findings are required by Rule 66 in a controversy of this sort, nor are such findings required by any local rule of court.

Petitioners' assertion (Pet. 7) that "the Court of Appeals has declared that the usual duties incumbent upon lower federal courts, to support their decisions with findings of fact and conclusions of law, are inapplicable to proceedings under the Holding Company Act" is, of course, a clear misconception of the ruling below. All that is decided is that detailed findings are not required of a judge in approving, before trial, a compromise settlement of doubtful litigation in the course of the administration of an estate under court supervision. Whether or not more detailed findings of fact and conclusions of law will be required in other controversies arising in proceedings under the Act depends, of course, upon the nature of the controversy before the court.

Petitioners cite a number of cases in which this Court and various lower federal courts have emphasized the necessity of adequate findings of fact and conclusions of law. However, none of these cases involved the compromise of litigation nor indeed the resolution of issues as dubious and imponderable as those in the compromised litigation, and all involved controversies which could be resolved only after a determination of the essential facts and applicable law. This is also true of *Kelley* v. *Everglades Drainage District*, 319 U. S. 415, cited by petitioners (Pet. 10, 11, 49), which involved approval of a plan of composition in a municipal bankruptcy proceeding under Chapter IX of the Bankruptcy Act, 11 U. S. C. 401, *et seq.* Moreover, findings of fact and conclusions of law are expressly required by Section 83 (e) of Chapter IX, 11 U. S. C. 403 (e), in approving such plan of composition. Accordingly, the court below has not decided the "findings" question "in a way probably in conflict" (Pet. 10) with any decision of this Court or that of any other tribunal.

2. The remaining question relates to the alleged inadequacy of the settlement in light of what petitioners regard as the probable recovery through litigation and, accordingly, the alleged abuse of judicial discretion in approving the compromise in question. This is not an issue of general public importance such as would warrant review by this

Court. In effect, petitioners are seeking to have this Court review the appraisal by two lower federal courts of the settlement value of uncertain claims involving, first, an evaluation of what could be expected to be proved if the litigation were prosecuted and, second, the application, largely, of local law to whatever facts might be established upon a trial on the merits. Moreover, we show below that petitioners' complaint as to abuse of judicial discretion is entirely unfounded.

A substantial portion of petitioners' brief is devoted to arguments on the problems of proof and the merits of the defenses which the Paper Company would avail itself if the lawsuits were continued. All of this, of course, is for the evident purpose of supporting petitioners' claim of a possible recovery of approximately $131,000,000 through litigation as compared with a recovery of $10,000,000 by way of settlement. The same arguments were made before the circuit court of appeals and were fully answered in the well-considered opinion of the court below. These arguments are also dealt with in the briefs of the other respondents, so that no useful purpose would be served by repeating the discussion in this brief. Suffice it to note that the Commission believes, and so advised the courts below, that there was ample warrant for the institution of legal proceedings against the Paper Company and its affiliates, and that continuation of the proceedings

might well have resulted in a judgment in excess of the amount of the settlement. However, petitioners' arguments appear to exaggerate greatly the certainty and total amount of recovery, and slight many legal and evidentiary matters which would have had to be encountered in the successful prosecution of the litigation. As the court below noted (R. 1725), "a defendant only has to make good on one defense to win a lawsuit." After full consideration of the various issues, the circuit court of appeals properly concluded (R. 1734–35) that "the questions involved in the litigation begun by the Trustee are hard and complicated both in facts to be proved and law to be applied" and that there was no abuse of discretion in the district court's determination to approve the compromise settlement.

Contrary to petitioners' assumption, there were substantial problems of proof and disputable issues of law. Petitioners treat the Brickley report as if it were a stipulation of facts agreed upon by the respective parties, whereas actually it is little more than a documented bill of complaint setting forth the facts which the plaintiff would endeavor to prove at a trial. Whatever its accuracy, the trustee was still faced with an enormous problem of proof relating to transactions dating as far back as the middle twenties and involving the production of numerous witnesses and documents, all subject to the hazards of cross-exami-

nation and countervailing evidence. The examination of witnesses during the course of Brickley's investigation had been private and *ex parte*. A substantial portion of the documentary evidence did not come from the Paper Company's files, was not subject to authentication, and possibly might not be admissible in the litigation instituted by the trustee. Moreover, petitioners' estimates of possible recovery are predicated upon theories of damages which may be subject to dispute and which might or might not be accepted by the court ultimately ruling upon the matter.

In view of the foregoing, the court below properly concluded that the district court did not abuse its discretion in telling "the Trustee it was proper to take the bird in hand instead of a prospective flock in the bush" (R. 1735).

3. *In re Central States Electric Corporation*, 143 F. 2d 684 (C. C. A. 4) cited by petitioners (Pet. 15–16), is not in conflict with the decision below. That case merely insisted upon a vigorous discharge of the functions of a reorganization trustee to investigate and prosecute causes of action growing out of the past management of the debtor. It was held that the reorganization judge was not warranted in abandoning efforts at recovery because a bondholders' committee had objected to the expenditures involved where other security holders as well as the Securities and

Exchange Commission urged, and the circuit court of appeals found, that there was a strong indication of the probable existence of causes of action. In the present case a full investigation has been made, litigation thereupon was instituted, and the settlement recommended both by the independent trustee and by the Commission which had also conducted an extensive investigation of its own.[9] The settlement thus obtained represents a substantial recovery for the estate. The opposition comes from junior security holders having a marginal interest, while the primary risk of rejecting the settlement in favor of expensive, protracted, and possibly fruitless litigation would fall upon the holders of the senior securities who have the dominant interest.

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[9] Contrary to petitioners' allegation (Pet. 12), the court below did not "merely accept the opinion of 'eminent counsel'" as in *Cohen* v. *Young*, 127 F. 2d 721 (C. C. A. 6). In that case, the district judge had approved dismissal of a class action under a compromise agreement solely because the attorneys representing all parties of record had agreed to it. The appellate court found that the district judge had not performed his function of examining the compromise for the purpose of satisfying himself that the interests of the corporation and the stockholders would be fully protected. In the present case, while the recommendations of the Commission and Brickley were given consideration, approval of the settlement was based upon all the circumstances relevant to the question of whether or not the compromise was for the best interests of the estate and was fair, reasonable, and adequate.

## CONCLUSION

The petition fails to disclose any question of general public importance, and there is no conflict between the decision below and that of any other court. The case was correctly decided below and there is no need for further review.

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947

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United States of America

IN THE

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OCTOBER TERM, 1946

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No. 825

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OSMOND Y. LADD and PAUL H. TODD,
Petitioners,

vs.

BARTHOLOMEW A. BRICKLEY,
Trustee of International Hydro Electric System,
SECURITIES & EXCHANGE COMMISSION, et al.,
Respondents

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## APPLICATION FOR REHEARING

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## APPLICATION FOR REHEARING

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The petition for certiorari in this case having been denied by the Court on February 10, 1947, petitioners Osmond Y. Ladd and Paul H. Todd make this present application for rehearing and for an order vacating denial and now granting certiorari.

1. Particularly, petitioners wish to be sure that they have made plain their point, that the Court of Appeals, with respect to Civil Procedure Rule 52(a), requiring findings of fact and conclusions of law by the lower courts in support of their decisions, has erroneously decided that this rule is not applicable to Section 11 enforcement proceedings under the Public Utility Holding Company Act, 15 U. S. C. A. Sec. 79k (d).

This decision involves an important principle of general interest to all litigants under the holding company act, and should be corrected.

The Appellate Court stated:

> "The second answer is that we do not think Rule 52(a) is applicable to this case * * *. The court was not trying issues on facts, it was administering an estate under the provisions of a federal statute, the Public Utility Holding Company Act of 1935. Mr. Brickley, as Trustee, was in a position similar to that of a receiver. The provision of the Federal Rules applicable to such situation is Rule 66, not Rule 52(a)" (R. 1736).

With respect to Section 11 enforcement proceedings for effectuating SEC orders in reorganization, simplification or liquidation of holding companies, it is provided—

> "* * * the Court, as a court of equity may, to such extent as it deems necessary * * * take exclusive jurisdiction and possession of the company * * * and the Court shall have jurisdiction in any such proceeding to appoint a trustee * * * to hold or administer under the direction of the Court, the assets so possessed * * *. In any such proceeding * * * the trustee with the approval of the Court shall have power to dispose of any and all of such assets and subject to such terms and conditions as the Court may prescribe, may make such disposition

> in accordance with a fair and equitable reorganization plan which has been approved by the Commission."
>
> 15 U. S. C. A. §79k (d).

In such proceedings, many types of contested issues are and can be involved, respecting which interested parties have rights of review. The reviewing courts in these cases, have the same need for considered findings and conclusions by the lower courts, as are required in other cases, generally. As these appeals become more numerous, we have no doubt that this Court will so recognize.

Rule 66 reads as follows:

> "The practice in the administration of estates by receivers or by other similar officers appointed by the Court shall be in accordance with the practice heretofore followed in the courts of the United States or as provided in rules promulgated by the district courts, but all appeals in receivership proceedings are subject to these rules."
>
> 28 U. S. C. A. Secs. 721-723 (West Pub. Co. Edn.) p. 740.

The District Court in Massachusetts has promulgated no rules on receiverships. Before adoption of Rule 66, it had not been the practice in Federal Courts to dispense with findings in contested receivership matters.

See former equity rule 70½ reading—

> "In deciding suits in equity * * * the Court of first instance shall find the facts specially and state separately its conclusions of law thereon."
>
> 28 U. S. C. A. Sec. 721-723 (West Pub. Co. Edn.) p. 816.

But in any event, Rule 66 as now effective, requires that proceedings on appeal in receivership proceedings be subject to these the Civil Procedure rules.

Findings of fact and conclusions of law are prerequisites for proper review under such rules. If all appeals are to be subject to these rules, it is implicit that appealable orders in receivership matters be supported by findings and conclusions, enabling an adequate review.

2. The Court of Appeals also held that general findings of an ultimate nature constituted sufficient compliance with Rule 52(a) and that findings upon subsidiary issues indicating factual basis for the ultimate decision, are unnecessary.

This runs counter to the *Kelly-Everglades case,* 319 U. S. 415 at 422.

In conclusion it is submitted that the foregoing considerations as to the proper interpretation of these new Civil Procedure rules in holding company enforcement cases, are matters of general concern to the great number of parties interested in such holding companies.

These considerations should be clarified by this Court and it is respectfully requested that rehearing be granted, that the order denying certiorari be vacated, and that certiorari be now granted.

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Howell Van Auken, counsel for Petitioners, hereby certifies that the foregoing petition for rehearing is presented in good faith and not for the purposes of delay.

HOWELL VAN AUKEN.

Dated: February 28, 1947.